

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of)  
TIME WARNER TELECOM OF HAWAII, )  
L.P., DBA OCEANIC COMMUNICATIONS )  
For Expedited Approval of )  
Financing, or for Waiver. )

DOCKET NO. 05-0272

DECISION AND ORDER NO. 22166

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DIV. OF CONSUMER ADVOCACY  
DEPT. OF COMMERCE AND  
CONSUMER AFFAIRS  
STATE OF HAWAII

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Karen Higashi.  
Chief Clerk of the Commission

ATTEST: A True Copy  
KAREN HIGASHI  
Chief Clerk, Public Utilities  
Commission, State of Hawaii.

K. Higashi.

BEFORE THE PUBLIC UTILITIES COMMISSION  
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In the Matter of the Application of)  
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Docket No. 05-0272

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DECISION AND ORDER

By this Decision and Order, the commission approves TIME WARNER TELECOM OF HAWAII, L.P., dba OCEANIC COMMUNICATIONS' ("Applicant") request for expedited approval of the proposed financial transaction described in its Application filed on October 28, 2005.

I.

Background

A.

Applicant

Applicant is a Delaware limited partnership with authority to transact business in the State of Hawaii ("State"). Applicant is a public utility as defined by Hawaii Revised Statutes ("HRS") § 269-1. Applicant provides interstate and intrastate telecommunications services such as dedicated access and local exchange services in the State.<sup>1</sup>

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<sup>1</sup>Applicant received commission authority to provide direct and resold telecommunication services through a series of

Time Warner Telecom, Inc. ("TWTC"), a publicly-held Delaware corporation, is Applicant's limited partner. Time Warner Telecom Holdings, Inc. ("TWTH"), wholly owned by TWTC, is Applicant's general partner and owns Time Warner Telecom Holdings II LLC and Time Warner Telecom General Partnership, which maintains a 1% general partnership interest in Applicant. Through its various certificated local operating subsidiaries, TWTC is a national competitive local exchange carrier ("CLEC") that offers an extensive range of telecommunications services.

TWTH is planning on entering "into a \$200 million incremental term loan B loan" ("Term Loan B Credit Facility") under an existing \$150 million revolving credit facility ("Existing Credit Facility").<sup>2</sup> Initially, as part of the proposed financing, the amount of the revolving loan available under the Existing Credit Facility ("Revolving Loans") will be reduced to \$110 million, but may be increased to \$200 million if the Term Loan B loans are reduced by the same amount, so that the

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proceedings. See Decision and Order No. 14145, filed on August 17, 1995, in Docket No. 94-0093 (granting Applicant a certificate of public convenience and necessity ("CPCN") to provide digital and analog intrastate dedicated transport telecommunications services within the City and County of Honolulu); Decision and Order No. 14395, filed on November 27, 1995, in Docket No. 95-0316 (granting Applicant's request to amend its CPCN to provide telecommunications services throughout the State); and Decision and Order No. 14842, filed on August 5, 1996, in Docket No. 95-0329 (dismissing as moot Applicant's request to amend its CPCN to expand its authority to provide direct and resold local exchange services in light of Hawaii Administrative Rules ("HAR") Chapter 6-80, which became effective on June 3, 1996).

<sup>2</sup>The Existing Credit Facility was previously approved by the commission. See Decision and Order No. 20880, filed on March 31, 2004, in Docket No. 04-0036.

total aggregate amount of the Term Loan B loans and the Revolving Loans do not exceed \$310 million. The Term Loan B Credit Facility and the possible increase in the amount of the Revolving Loans are hereinafter referred to as the "Proposed Financing." The Proposed Financing will be guaranteed by each state level operating subsidiary, including Applicant, through a guaranty and pledge of their respective stock, interests, and assets.

On October 28, 2005, Applicant filed an application for expedited approval of the Proposed Financing, pursuant to HRS §§ 269-7(a), 269-17, and 269-19, as applicable ("Application"). In the alternative, Applicant requests that the Proposed Financing be waived or exempted from the applicable approval requirements, pursuant to HRS § 269-16.9(e).<sup>3</sup> Pursuant to HAR § 6-61-76, Applicant incorporates by reference its most recent year-end financial statements filed with the commission on July 29, 2005, to satisfy the filing requirements of HAR § 6-61-75. However, to the extent that any other financial or other documentation is required, Applicant requests an exemption from these requirements under HRS § 269-16.9. In an effort to capitalize on favorable market conditions, Applicant is requesting expedited treatment of its Application.<sup>4</sup>

Applicant served copies of the Application on the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND

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<sup>3</sup>No persons moved to intervene or participate in this docket.

<sup>4</sup>The closing date for the Proposed Financing is December 8, 2005.

CONSUMER AFFAIRS ("Consumer Advocate"), an *ex officio* party to this docket pursuant to HRS § 269-51 and HAR § 6-61-62.

B.

Proposed Financing

Applicant represents that the proceeds from the Proposed Financing will be used for capital expenditures and general corporate purposes, and that the loan proceeds will allow TWTH to redeem \$200 million of TWTC's Senior Notes that are due in 2008 ("2008 Notes"). Since an equivalent amount of 2008 Notes will be retired, Applicant maintains that there will be no change in TWTC's consolidated gross debt encumbering Applicant's assets. However, the Proposed Financing is expected to benefit TWTC through: (a) replacement of a significant portion of TWTC's consolidated debt with debt at a lower rate;<sup>5</sup> (b) extension of the maturity date of the debt by approximately two (2) to three (3) years; and (c) on-going interest savings. Applicant states that the Proposed Financing is "intended to strengthen TWTC's overall financial stability, and place TWTC in a better financial position by improving its overall debt service to earnings before interest, taxes, depreciation, and amortization ("EBITDA") ratios, thus enhancing TWTC's (and thus ultimately Applicant's) growth and ability to compete effectively in Hawaii and elsewhere."<sup>6</sup>

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<sup>5</sup>The Term Loan B Credit Facility will have a floating interest rate, currently estimated to be 6.7% at current rates.

<sup>6</sup>See Application at 4.

Applicant represents that upon approval of the Proposed Financing, it will execute a guaranty for the transaction which will be payable at periods of more than twelve (12) months from the issuance and would, thus, require commission approval under HRS § 269-17. Applicant states that the precise use of the loan funds has not yet been determined, however, proceeds from the Proposed Financing may be used to extend and improve Applicant's Hawaii network. However, to the extent that the proposed uses of the proceeds from the Proposed Financing are not within the permitted uses of HRS § 269-17, Applicant requests a waiver of this requirement.

Additionally, Applicant contends that commission approval of the Proposed Financing will be needed under HRS § 269-19 since Applicant will be granting the lenders under the Proposed Financing a security interest in the same collateral and Applicant's partnership interest that secures the Existing Credit Facility. Moreover, Applicant recognizes the commission's jurisdiction to review all financial transactions that relate to Applicant and its parent and affiliates under HRS § 269-7(a).

Applicant contends that commission approval of the Proposed Financing is reasonable and in the public interest. In this regard, Applicant represents that the Proposed Financing will have no material impact on: (1) its operations, customers, or the public interest; nor (2) its existing tariff rates or customer services. Applicant also maintains that portions of the proceeds from the Proposed Financing may be used to extend or improve its Hawaii facilities and that the proposed transaction

will indirectly benefit Applicant by providing its parent, TWTC, with increased financial flexibility. Applicant also represents that its customers will "continue to receive the increased benefits of facilities-based competition, including: diversity in routing; network redundancy and increased network reliability, lower priced high-quality services; broader customer choices[;] and service innovation."<sup>7</sup> Moreover, Applicant states that the Proposed Financing will enhance Applicant's ability to compete in the State's local exchange market by providing access to more financial resources, which will allow it to respond to competitive pressures in the evolving telecommunications market and to continue to provide Applicant's customers with a full facilities-based competitive choice. Accordingly, Applicant contends that approval of the Proposed Financing will reinforce the commission's long-standing goal of fostering facilities-based competition in the telecommunications market.

In the alternative, Applicant requests that the commission waive the approval requirements for the Proposed Financing under HRS § 269-16.9(e) consistent with prior commission proceedings.<sup>8</sup> Similar to the commission's findings in Docket Nos. 04-0356, 05-0022, and 05-0076, Applicant contends

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<sup>7</sup>See Application at 7.

<sup>8</sup>See In re Level 3 Communications, LLC, Decision and Order No. 21661, filed on February 28, 2005, in Docket No. 04-0356 ("Docket No. 04-0356"); In re Primus Telecommunications, Inc., Decision and Order No. 21805, filed on May 6, 2005, in Docket No. 05-0022 ("Docket No. 05-0022"); and In re ITC^DeltaCom, Communications, Inc. and Business Telecom, Inc., Decision and Order No. 21890, filed on June 24, 2005, in Docket No. 05-0076 (Docket No. 05-0076").

that it is not a dominant carrier, the transaction is reasonable and in the public interest, and that competition will serve the same purpose as public interest regulation. Moreover, Applicant states that waiver of the regulatory requirements in this instance will reduce regulatory delay and costs to TWTC and its subsidiaries and assist in the timely finalization of the Proposed Financing.

C.

Consumer Advocate's Position

On November 10, 2005, the Consumer Advocate filed its Statement of Position informing the commission that it does not object to approval of the Proposed Financing ("Consumer Advocate's Statement of Position"). Having reviewed the Application, the Consumer Advocate recommends that the commission, on its own motion, waive the HRS § 269-17 requirement regarding the use of long term debt proceeds since this restriction is more applicable to companies that are subject to rate of return regulation. The Consumer Advocate recognizes that this requirement is "intended to reinforce the relationship between the capital structure upon which the overall rate of return is determined and the rate base of a public utility entity that is subject to rate of return regulation."<sup>9</sup> The Consumer Advocate explains that Applicant is a CLEC that is not subject to rate of return regulation. Thus, to the extent that the proceeds from the Proposed Financing are used for

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<sup>9</sup>See Consumer Advocate's Statement of Position at 3.



general corporate purposes as opposed to capital expenditures, the Consumer Advocate recommends that the commission waive HRS § 269-17's requirement regarding the use of the loan proceeds and approve the request to enter into the Proposed Financing. The Consumer Advocate's recommendation is based on Applicant's representations that the proposed transaction: (1) will not have any material adverse impact upon Applicant's public utility operations in the State; (2) will strengthen TWTC's overall financial position, and allow Applicant and TWTC to acquire property to improve Applicant's telecommunications services and strengthen its competitive position; and (3) will not have a material adverse effect on Applicant's operations, customers, or the public interest.

Moreover, the Consumer Advocate contends that Applicant's guarantee and pledge of stock, interests, and assets is not expected to have a significant negative impact on Applicant's ability to provide services to its customers should a default on the loan occur. The Consumer Advocate contends that while Applicant is one of the larger providers of telecommunications services in the State, the commission has authorized a number of telecommunications providers in the local market; therefore, if there are any adverse consequences from the Proposed Financing, "consumers in Hawaii will have the option of selecting another service provider and the market place, it is assumed, will then serve to mitigate any traditional public

utility regulatory concerns regarding the proposed debt financing affecting [the Applicant]."<sup>10</sup>

Based on the foregoing discussion and past commission rulings, the Consumer Advocate states that it does not object to: (1) the approval of the Proposed Financing; (2) the waiver of HRS § 269-17's requirements to the extent that any proposed uses of the proceeds from the Proposed Financing are not within the permitted purposes of the statute; and (3) the guarantee and pledge of stock, interests, and assets of Applicant, requiring commission approval under HRS § 269-19. Additionally, the Consumer Advocate recommends that Applicant be granted a waiver of the HAR § 6-61-101(b)(2) requirement that it file a copy of the executed loan agreement with the commission and Consumer Advocate.

With regard to Applicant's alternative request for a waiver of the applicable approval requirements concerning the Proposed Financing, the Consumer Advocate states that HRS §§ 269-17 and 269-19's approval requirements should not be waived, in their entirety. The Consumer Advocate contends that Applicant has increased its market share in Hawaii since receiving its certification to provide service. Upon review of Applicant's 2004 annual financial report, the Consumer Advocate attests that Applicant can be viewed as one of the State's significant telecommunications providers and is dissimilar to CLECs cited by Applicant in Section D of the Application.

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<sup>10</sup>See Consumer Advocate's Statement of Position at 5.

## II.

### Discussion

HRS § 269-17 states, in part:

A public utility corporation may, on securing the prior approval of the public utilities commission, and not otherwise, issue stocks and stock certificates, bonds, notes, and other evidences of indebtedness, payable at periods of more than twelve months after the date thereof, for the following purposes and no other, namely: for the acquisition of property or for the construction, completion, extension, or improvement of or addition to its facilities or service, or for the discharge or lawful refunding of its obligations or for the reimbursement of moneys actually expended from income or from any other moneys in its treasury not secured by or obtained from the issue of its stocks or stock certificates, or bonds, notes, or other evidences of indebtedness, for any of the aforesaid purposes except maintenance of service, replacements, and substitutions not constituting capital expenditure in cases where the corporation has kept its accounts for such expenditures in such manner as to enable the commission to ascertain the amount of moneys so expended and the purposes for which the expenditures were made, and the sources of the funds in its treasury applied to the expenditures. . . . All stock and every stock certificate, and every bond, note, or other evidence of indebtedness of a public utility corporation not payable within twelve months, issued without an order of the commission authorizing the same, then in effect, shall be void.

HRS § 269-17 (emphasis added).

HRS § 269-19 provides, in part, that no public utility shall, "sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its road, line, plant, system, or other property necessary or useful in the performance of its duties to the public . . . without first having secured from the . . . commission an order authorizing it so to do." (Emphasis

added). It further states that "[e]very such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the order of the commission shall be void."<sup>11</sup> The purpose of HRS § 269-19 is to safeguard the public interest.<sup>12</sup>

Moreover, under HRS § 269-7(a), the commission is empowered to examine the condition of a public utility, the manner in which it is operated with reference to the safety or accommodation of the public, "and all matters of every nature affecting the relations and transactions between it and the public or persons or corporations." Accordingly, the commission, under HRS § 269-7(a), has the authority to examine any and all transactions of the public utility that affect or may affect the public that it serves.

Under HRS § 269-16.9(e), "[t]he commission may waive other regulatory requirements under this chapter applicable to telecommunications providers when it determines that competition will serve the same purpose as public interest regulation." Similarly, HAR § 6-80-135 allows the commission to grant an exemption from or waive the applicability of any of the provisions of HRS chapter 269 or any rule (except provisions related to HRS § 269-34), upon a determination that an exemption or waiver is in the public interest.

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<sup>11</sup>HRS § 269-19.

<sup>12</sup>See In re Honolulu Rapid Transit Co., 54 Haw. 402, 409, 507 P.2d 755, 759 (1973).

Upon review of the record in this docket, the commission finds the Proposed Financing to be reasonable and in the public interest. The commission's decision regarding this matter is based on, among other matters, Applicant's representations that the Proposed Financing: (1) will not materially impact Applicant's operations in the State; (2) will not impact Applicant's tariff rates or its existing services; and (3) will have no adverse impact on Applicant's customers or the public interest. It also appears, based on Applicant's representations, that the Proposed Financing is designed to strengthen TWTC's overall financial position by replacing a large portion of its consolidated debt with a debt at a lower rate, increase the maturity date of the debt by two (2) to three (3) years, and allow TWTC to achieve interest savings. The commission notes Applicant's representation that there will be no change in TWTC's gross debt encumbering Applicant's assets since an equivalent amount of prior debt is intended to be retired.

Additionally, it appears that Applicant will benefit from the Proposed Financing since the transaction will provide Applicant access to greater financial resources allowing Applicant to better respond to competitive pressures in the State's telecommunications market and, thus, provide customers in Hawaii with a stronger facilities-based competitive choice. Accordingly, the Proposed Financing appears to further the commission's objective of fostering competition in the State's telecommunications market.

The commission also agrees with the Consumer Advocate's contention that adverse consequences resulting from Applicant's guarantee and pledge of stock, interests, and assets should not significantly impact Applicant's customers should a default on the loan occur due to current market forces. The Consumer Advocate explains that since the commission has authorized a number of telecommunications providers to operate in the State, any negative consequences from the Proposed Financing should not significantly impact Hawaii customers since customers in Hawaii will have the option to select another service provider and "the market place, it is assumed, will then serve to mitigate any traditional public utility regulatory concerns regarding the proposed debt financing affecting [the Applicant]."<sup>13</sup>

Moreover, the commission finds that: (1) Applicant provides competitive local exchange services in the State; (2) the extent to which proceeds from the Proposed Financing is not specifically used for permitted purposes under HRS § 269-17 should have little effect on Applicant's customers because Applicant is not a public utility subject to rate of return regulation; and (3) competition, in this instance, will serve the same purpose as public interest regulation. Accordingly, the commission finds the Consumer Advocate's recommendation that we waive the requirements of HRS § 269-17 to the extent that any proposed uses of the proceeds from the Proposed Financing are not within the permitted purposes under HRS § 269-17 to be reasonable and appropriate. Similarly, the commission finds the

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<sup>13</sup>See Consumer Advocate's Statement of Position at 5.

Consumer Advocate's recommendation to waive the filing requirements of HAR § 6-61-101(b)(2), in this instance, to also be reasonable. Moreover, to the extent that the Application is inconsistent with any other filing requirements of HAR Chapter 6-61, as applicable, the commission again finds, in this case, that competition will serve the same purpose as public interest regulation, and that a waiver of these requirements is also appropriate. The commission's decision to waive applicable filing requirements of HAR Chapter 6-61, including HAR §§ 6-61-101(b)(2) and 6-61-105(c)(2), is based on the commission's finding that the Proposed Financing is reasonable and in the public interest; and reflects the commission's recognition of the time sensitive nature of the Application.

Based on the foregoing, the commission concludes that the Proposed Financing should be approved under HRS §§ 269-17 and 269-7(a), as applicable. To the extent that the proceeds from the Proposed Financing are used for purposes aside from those permitted under HRS § 269-17, the commission concludes that the applicability of that requirement of the section should be waived, pursuant to HRS § 269-16.9(e) and HAR § 6-80-135. Applicant's guarantee and pledge of stock, interests, and assets associated with the Proposed Financing should be approved, pursuant to HRS § 269-19. Moreover, to the extent that the Application is inconsistent with the filing requirements of HAR Chapter 6-61, the commission concludes that the applicability of those requirements, including HAR §§ 6-61-101(b)(2) and

6-61-105(c)(2), should also be waived, pursuant to HRS § 269-16.9(e) and HAR § 6-80-135.

The commission finds Applicant's alternative request for a waiver of the approval requirements for the Proposed Financing, pursuant to HRS § 269-16.9(e), to be unnecessary due to the commission's determinations regarding the Proposed Financing, as set forth above. Moreover, the commission agrees with the Consumer Advocate's assertion that Applicant should not be granted a waiver of the applicable approval requirements in their entirety. As the Consumer Advocate notes, Applicant is one of the State's significant telecommunications providers and, thus, Applicant is dissimilar to the CLECs that obtained commission waivers of applicable approval requirements in past proceedings, which Applicant refers to in its Application.

### III.

#### Orders

##### THE COMMISSION ORDERS:

1. The Proposed Financing, described in Applicant's Application filed on October 28, 2005, is approved, pursuant to HRS §§ 269-17 and 269-7(a). To the extent that the proceeds from the Proposed Financing are used for purposes aside from those permitted under HRS § 269-17, the applicability of that requirement of the section is waived, pursuant to HRS § 269-16.9(e) and HAR § 6-80-135.



2. The guarantee and pledge of Applicant's stock, interests, and assets related to the Proposed Financing are approved, pursuant to HRS § 269-19.

3. To the extent that the Application is inconsistent with any filing requirements of HAR Chapter 6-61, the applicability of those requirements, including those of HAR §§ 6-61-101(b)(2) and 6-61-105(c)(2), are waived, pursuant to HRS § 269-16.9(e) and HAR § 6-80-135.

4. This docket is closed, unless ordered otherwise by the commission.

DONE at Honolulu, Hawaii DEC - 6 2005.

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By Carlito P. Caliboso  
Carlito P. Caliboso, Chairman

By (Excused)  
Wayne H. Kimura, Commissioner

APPROVED AS TO FORM:

By Janet E. Kawelo  
Janet E. Kawelo, Commissioner

Ji Sook Kim  
Ji Sook Kim  
Commission Counsel

05-0272.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 22166 upon the following Petitioners, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
DIVISION OF CONSUMER ADVOCACY  
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DATED: DEC - 6 2005